Evans v. Romer, No. 93SA17

JUSTICE ERICKSON dissenting:

I respectfully dissent. This is an appeal of a district court order granting a preliminary injunction that prohibits the Governor and the Attorney General from enforcing a voter-initiated amendment to the Colorado Constitution ("Amendment 2").[1] The issue before us is whether the district court for the City and County of Denver properly concluded that the appellees met the requirements set forth in Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982), and C.R.C.P. 65, for the issuance of a preliminary injunction. Because we are reviewing the district court's underlying legal premise for the injunction, we are obligated to apply a de novo standard of review. Based on that standard, I would reverse and discharge the preliminary injunction, and remand for trial on the permanent injunction.

The district court issued the preliminary injunction based on its conclusion that Amendment 2 must be evaluated under the strict scrutiny standard of review. The strict scrutiny standard of review was found to be applicable based on a fundamental right "not to have the State endorse and give effect to private biases" with respect to "an identifiable class." The district court's delineation of the fundamental right supporting the preliminary injunction has never been identified or

---

[1] A state constitutional amendment passed through the initiative process "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed." See Colo. Const. art. V, § 1. The injunction was sought to prevent Amendment 2 from taking effect.

recognized by the United States Supreme Court or by any other court. As such, the district court's recognition of a new fundamental right is based on an underlying legal premise that is erroneous.

The majority upholds the preliminary injunction and agrees that Amendment 2 should be evaluated under the strict scrutiny standard of review. Unlike the district court, however, the majority concludes that strict scrutiny applies based on the recognition of a different fundamental right, "the right to participate equally in the political process." Maj. op. at 14. In my view, based on the United States Supreme Court precedent cited in the majority opinion, the majority's conclusion is also erroneous.

Since I cannot agree that Amendment 2 should be evaluated under the strict scrutiny standard of review based on Supreme Court precedent defining fundamental constitutional rights, I would reverse the district court and discharge the preliminary injunction.

I

On November 3, 1992, Amendment 2 passed by a margin of 813,966 to 710,151. Amendment 2 provides:

> **No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.** Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status,

quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, the appellees filed suit to permanently enjoin the enforcement of Amendment 2, alleging that it violated provisions of both the Colorado and United States Constitutions. The appellees claimed, inter alia, that Amendment 2 violated (1) the rights to freedom of association and expression under the First Amendment; (2) the fundamental right to petition the government for redress of grievances; (3) the fundamental right to vote; and (4) the fundamental right to participate equally in the political process. After the district court rejected the request of the appellees for an expedited hearing on the merits, they filed motions to preliminarily enjoin the Governor and the Attorney General from enforcing Amendment 2.

The appellees based their motion for a preliminary injunction solely on the United States Constitution, claiming that Amendment 2 violated their First Amendment right to freedom of expression and their Fourteenth Amendment right to equal protection of the laws.[2] In their motion, the appellees did not claim that Amendment 2 violated the Equal Protection Clause

---

[2]An amendment to the state constitution cannot be unconstitutional, unless and to the extent it violates the United States Constitution. Cf. Colo. Const. art. II, § 2; Cooper Motors, Inc. v. Board of County Comm'rs, 131 Colo. 78, 84, 279 P.2d 685, 688 (1955) ("[t]he people can do any thing by constitutional amendment unless prohibited by the terms of the Constitution of the United States").

because a suspect class was involved.[3] Instead, the appellees

---

[3]The majority recognizes that gay men, lesbians, and bisexuals constitute an "identifiable group." Maj. op. at 33. This conclusion is true, just as is the fact each of the three groups standing alone constitutes an identifiable group based on the sexual orientation and conduct of gay men, lesbians, and bisexuals. The mere fact that a group can be identified, however, does not mean that the group constitutes a suspect class that receives heightened scrutiny under the Equal Protection Clause. See, e.g., Heller v. Doe, No. 92-351, 1993 WL 218271, at *5 (U.S. June 24, 1993) (recognizing that the Supreme Court has declined to apply heightened scrutiny to the identifiable groups of the mentally ill or the mentally retarded); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (declining to apply heightened scrutiny to the identifiable group of elderly individuals).

In fact, courts have consistently rejected claims that the identifiable group of homosexuals constitutes a suspect class. See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (concluding that homosexuals are neither a suspect or quasi-suspect class); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (same), cert. denied sub nom. Ben-Shalom v. Stone, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same), cert. denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (same); National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984) (same), aff'd, 470 U.S. 903 (1985); Steffan v. Cheney, 780 F. Supp. 1, 10 (D.D.C. 1991) (same).

For example, Padula rejected the claim that homosexuals constitute a suspect class by stating that "[i]f the Court [in Bowers v. Hardwick, 478 U.S. 186 (1986)] was unwilling to object to state laws that criminalized the behavior that defines the class, it is hardly open to a lower court to conclude that state-sponsored discrimination against the class is invidious [because] there can hardly be a more palpable discrimination against a class than making the conduct that defines the class criminal." Padula, 822 F.2d at 103. A number of states continue to classify the conduct that defines the class as criminal behavior. See, e.g., Ala. Code § 13A-6-65(a)(3) (1975); Ark. Code Ann. § 5-14-122 (Michie 1987); Ga. Code Ann. § 16-6-2 (1992); Kan. Stat. Ann. § 21-3505 (1988 & 1992 Supp.); Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1990); Md. Code Ann. Crimes and Punishment § 554 (1954); Mich. Stat. Ann. § 28.355 (Callaghan 1990); Minn. Stat. § 609.293 (1992); N.Y. Penal Law § 130.38 (McKinney 1987); Okla. Stat. Ann. tit. 21, § 886 (West 1983 & 1993 Supp.); S.D. Codified Laws Ann. § 22-22-2 (1988 & 1993 Supp.).

based their equal protection argument on an alleged infringement of the fundamental right to participate equally in the political process. The appellees claimed that if the district court concluded that Amendment 2 impinged on either the First or the Fourteenth Amendment, a strict scrutiny standard of review should apply under which the State would have the burden of establishing a compelling state interest.[4]

After conducting a four-day hearing and without making any findings of fact, the district court granted the preliminary injunction. In rendering its decision, the district court agreed that the strict scrutiny standard of review applied to Amendment 2. However, the district court did not rely upon either the First Amendment argument advanced by the appellees or address the fundamental right asserted by the appellees in their motion for the preliminary injunction. Instead, the district court held that Amendment 2 must satisfy the strict scrutiny standard of review based on a fundamental right not to have the State endorse and give effect to private biases.[5] Pending resolution of this

---

[4]The appellees alternatively asserted that the burdens Amendment 2 imposed on gay men, lesbians, and bisexuals lacked a rational basis.

[5]The appellees assert on appeal that "read in light of the arguments actually presented to the district court, th[e district court's] holding is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation." As the majority recognizes, this assertion is meritless. See maj. op. at 8. The district court's order simply does not address the fundamental rights argument advanced by the appellees or their First Amendment claim.

appeal, trial has been set in October 1993, to determine whether a permanent injunction should be issued.

II

Although this case presents a number of legal questions, it is not necessary or appropriate for this court to determine all of the issues raised before the district court. The sole issue before us on this appeal is the validity of the preliminary injunction issued by the district court. As such, the logical starting point is the district court's order and the reasons for the entry of the preliminary injunction. Neither the majority nor the appellees defend the underlying premise of the district court's order which identified a new fundamental right as the basis for applying the strict scrutiny standard of review. The explanation is simple--the district court erred in issuing a preliminary injunction based on a fundamental right not to have the State endorse and give effect to private biases. Before addressing the district court's order, however, it is necessary to outline the appropriate standard of review on appeal for the issuance of a preliminary injunction.

A

It is well settled that an appellate court must reverse the granting of a preliminary injunction if the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975); Shango v. Jurich, 681 F.2d 1091, 1096 (7th Cir. 1982); e.g., Wakabayashi v. Tooley, 648 P.2d 655 (Colo. 1982).

In Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982), we delineated the standard for a trial court to apply in ruling on a preliminary injunction motion. Before a trial court may issue a preliminary injunction under Rathke, "the moving party must establish, as a threshold requirement, a clear showing that injunctive relief is necessary to protect existing . . . fundamental constitutional rights." Id. at 653. Accordingly, to determine whether the threshold requirement of Rathke is satisfied, a trial court must analyze whether the United States Supreme Court has recognized the fundamental right at issue. Id.; cf. Dronenburg v. Zech, 741 F.2d 1388, 1396 n.5 (D.C. Cir. 1984) (stating that "the only question open to [a lower court is] whether the Supreme Court has created a right, which, fairly defined, covers the case before [it] or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case [it] must now decide").

The issuance of a preliminary injunction by a trial court must also be guided by sound legal principles. See Shango, 681 F.2d at 1096; Charles v. Carey, 627 F.2d 772, 776 (7th Cir. 1980). When a preliminary injunction is based on an erroneous legal premise, the underlying premise is subject to de novo review by an appellate court, which can determine whether the premise is erroneous. See Shango, 681 F.2d at 1096; Buffalo Courier-Express, Inc. v. Buffalo Evening News, 601 F.2d 48, 59 (2d Cir. 1979); Douglas v. Beneficial Fin. Co., 469 F.2d 453, 454 (9th Cir. 1972); Delaware & Hudson Ry. Co. v. United Transp.

Union, 450 F.2d 603, 620 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971); Quaker Action Group v. Hickel, 421 F.2d 1111, 1115 (D.C. Cir. 1969); accord Bloomer v. Boulder County Bd. of Comm'rs, 799 P.2d 942, 944 (Colo. 1990). While a determination on appeal that a trial court's underlying legal premise is erroneous does not reflect that the trial court was chargeable with an abuse of discretion, see Delaware, 450 F.2d at 620-21, a preliminary injunction predicated on a clear mistake of law may nevertheless require reversal. Shango, 681 F.2d at 1096; Charles, 627 F.2d at 776; Delaware, 450 F.2d at 623.

Based on the foregoing principles, it is appropriate to apply a de novo standard of review in this case to evaluate the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases. A review of Supreme Court jurisprudence concerning fundamental rights is therefore necessary to determine whether the premise relied upon by the district court is erroneous.[6]

---

[6]Our review in this case is limited to the United States Constitution. See supra note 2 and accompanying text. Accordingly, we are required to follow the pronouncements of the Supreme Court. People v. Cisneros, No. 91SC467, 1993 WL 242337, at *9 (Colo. July 6, 1993) (Erickson, J., concurring) (stating that state courts are bound by Supreme Court precedent interpreting the federal Constitution and cannot impose greater limitations or afford more protections under the federal Constitution than the Supreme Court has in its decisions); cf. Lockhart v. Fretwell, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring) (stating that under the structure of our national system, a state court decision interpreting the federal Constitution is no less authoritative than a lower federal court decision).

B

Under traditional equal protection analysis, legislation that involves a suspect classification or affects a fundamental right is subject to the strict scrutiny standard of review. Heller v. Doe, No. 92-351, 1993 WL 218271, at *5 (U.S June 24, 1993); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985); see generally 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law Substance and Procedure § 18.3, at 12-28 (2d ed. 1992 & 1993 Supp.) [hereinafter Treatise on Constitutional Law]. If the government cannot show a compelling state interest, legislation that involves a suspect classification or affects a fundamental right will be declared unconstitutional. See Heller, 1993 WL 218271, at *5; Cleburne, 473 U.S. at 440.

Justice Stone's discussion of "discrete and insular minorities" in his renowned footnote 4 of United States v. Carolene Products Co., 304 U.S. 144 (1938), explains the rationale for subjecting legislation involving a suspect classification to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); e.g., Graham v. Richardson, 403 U.S. 365, 372 (1971).[7] Since that time, the

---

[7]Justice Stone explained in footnote 4:

> [W]e need [not] enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and (continued...)

Supreme Court has held, without exception, that the strict scrutiny standard of review applies to legislation or state constitutional amendments based on traditionally suspect classifications. See, e.g., Graham, 403 U.S. at 372 (alienage); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Korematsu v. United States, 323 U.S. 214, 215 (1944) (national origin).[8]

Similarly, the Supreme Court has held repeatedly that the strict scrutiny standard of review applies to legislation that affects a "fundamental" constitutional right. The identification of a right as a fundamental right is a substantive decision unrelated to equal protection or the technical standards of review. See 3 Treatise on Constitutional Law § 18.3, at 18; see generally 2 Treatise on Constitutional Law § 15.7, at 427-37. The decision of whether a right is fundamental involves a judicial determination that the text or structure of the federal Constitution evidences a value that should be taken from the control of the political branches of government and is best characterized as a substantive due process decision. See 3

---

[7](...continued)
insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Products, 304 U.S. at 152-53 n.4 (citations omitted).

[8]In this case, the appellees did not assert before the district court or on appeal that Amendment 2 should be evaluated under the strict scrutiny standard of review based on suspect class analysis. See also supra note 3 (listing courts that have rejected argument that homosexuals constitute a suspect class).

Treatise on Constitutional Law § 18.3, at 18 n.19; Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Powell, J., concurring); see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (suggesting that fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution).

For example, the decision of the Supreme Court to find the right to vote to be a constitutionally protected fundamental right that is subject to the strict scrutiny standard of review was a substantive due process determination based on an analysis of the importance of the right to vote and the provisions of the Constitution. See 3 Treatise on Constitutional Law § 18.31, at 766. The Supreme Court has employed similar analysis to recognize the fundamental rights of interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969), privacy, Griswold v. Connecticut, 381 U.S. 479, 484 (1965), and most of the provisions set forth in the Bill of Rights. See, e.g., Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (using equal protection analysis to strike down a law that infringed upon fundamental rights within the First Amendment).[9]

---

[9]Under the Due Process Clause of the Fourteenth Amendment, most of the provisions of the Bill of Rights have been applied to the states because the Supreme Court has found them to be "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319 (1937), or "fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 148-49, reh'g denied, 392 U.S. 947 (1968). Today, virtually all of the provisions of the Bill of Rights have been incorporated into the Fourteenth Amendment. E.g., Benton v. Maryland, 395 U.S. 784 (1969) (incorporating Fifth Amendment protection against double

(continued...)

For the most part, however, the Supreme Court has refused to expand the list of fundamental constitutional rights. The number of rights that the Supreme Court has found to be fundamental, and therefore worthy of strict judicial scrutiny, is quite limited. Among others, the Supreme Court has refused to declare education, housing, welfare payments, or government employment to be of fundamental constitutional value. See 3 Treatise on Constitutional Law § 18.42, at 821-31.

---

[9](...continued)
jeopardy); Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating Sixth Amendment right to counsel in criminal prosecution); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating Fourth Amendment regulation against unreasonable search and seizures); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating First Amendment free speech protection); but see Hurtado v. California, 110 U.S. 516 (1884) (refusing to incorporate grand jury indictment guarantee of the Fifth Amendment).

The rights that have been held applicable to the states through the Fourteenth Amendment are also considered fundamental rights for purposes of equal protection analysis. See 3 Treatise on Constitutional Law § 18.39, at 490. As Professors Nowak and Rotunda explain:

> [L]aws which classify persons in terms of their abilities to exercise rights which have specific recognition in the first eight amendments do not generally arise as equal protection issues. In these instances the denial of the right to one class of persons is likely to be held a violation of the specific guarantee without any need to resort to equal protection analysis. Thus, if the state or federal government were to deny to a specific class of persons the right to bail upon certain criminal charges, the classification should be analyzed to determine the compatibility of the law with the substantive guarantees of the eighth amendment prohibition of excessive bail, although it could just as easily be analyzed as an equal protection issue.

Id. at 490-91.

Bowers v. Hardwick, 478 U.S. 186 (1986), in which the Supreme Court rejected the assertion that the federal Constitution conferred a fundamental right on homosexuals to engage in sodomy, is instructive of the type of analysis used by the High Court to address the substantive due process question of whether a fundamental right exists. In answering the substantive due process question, Justice White reviewed prior cases addressing fundamental rights:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." Id., at 503 (Powell, J.). See also Griswold v. Connecticut, 381 U.S., at 506.
>
> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.

Bowers, 478 U.S. at 191-92; see generally John E. Nowak, The "Sixty-Something" Anniversary of the Bill of Rights, 1992 U. Ill. L. Rev. 445, 462-76 (reviewing different methods of constitutional interpretation).

Having concluded that a fundamental right to engage in homosexual sodomy did not exist, Justice White emphasized that the case also "call[ed] for some judgment about the limits of the

Court's role in carrying out its constitutional mandate," Bowers, 478 U.S. at 190, and stated:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Id. at 194-95 (emphasis added). Given the express reluctance of the Supreme Court to recognize "new" fundamental rights, I address the district court's order.

C

In this case, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases provided the basis for issuing the preliminary injunction. However, a review of the Supreme Court precedent cited by the district court to justify the issuance of the preliminary injunction leads me to conclude that the Supreme Court has not recognized the fundamental right identified by the district court.

In support of its recognition of a new fundamental right, the district court cited language from Reitman v. Mulkey, 387 U.S. 369 (1967), and Palmore v. Sidoti, 466 U.S. 429 (1984). The

district court also referred to City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), and Pruitt v. Cheney, 943 F.2d 989 (9th Cir. 1991) to bolster its reasoning. Properly analyzed, these cases do not support judicial recognition of a fundamental right not to have the State endorse and give effect to private biases, but rather indicate that the district court extrapolated a fundamental right from the language appearing in the various decisions.

In Reitman, the Supreme Court reviewed a voter-initiated state constitutional amendment which the California Supreme Court concluded was intended to encourage and authorize racial discrimination. Reitman, 387 U.S. at 376. The California Supreme Court found that the intent of the constitutional amendment was to create a constitutional right to discriminate on racial grounds and therefore dealt with the amendment as though it expressly authorized and constitutionalized the private right to discriminate against racial minorities. Id. The Supreme Court accepted the findings of the California court and concluded that "there was no sound reason [to] reject [its] judgment" that the amendment involved racial discrimination in violation of the Fourteenth Amendment. Id.

Language subsequently appeared in Reitman which was seized on by the district court in support of the recognition of a fundamental right of any identifiable group not to have the state endorse and give effect to private biases. Reitman stated:

> The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the

> State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Id. at 377 (emphasis added). Based on this language from Reitman, the district court characterized the analysis of the Supreme Court as involving a fundamental right. The district court's conclusion is erroneous insofar as Reitman's equal protection analysis focused solely on the racial classification drawn by the constitutional amendment and represents traditional suspect classification analysis. As such, no court or commentator has ever viewed Reitman, either alone or in combination with other cases, as having applied fundamental right analysis.

In Palmore, the Supreme Court invalidated a child custody order that had been based solely on a judicial determination that it would be harmful to a child to remain in a racially mixed household. Palmore, 466 U.S. at 431. Palmore struck down the lower court's custody order because it represented invidious racial prejudice. In doing so, Palmore explicitly stressed the importance of the racial classification and accordingly concluded that the strict scrutiny standard of review applied. Id. at 432-33 (stating that "classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny").

Palmore also stated "the Constitution cannot control such prejudices but neither can it tolerate them . . . private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Id. at 433. Despite this language, which was cited by the district court in this case, the fact remains that Palmore was based on traditional suspect classification analysis and not a fundamental right not to have the State endorse and give effect to private biases. Like Reitman, no court or commentator has ever viewed Palmore, either alone or in combination with other cases, as having applied fundamental right analysis.

The district court further found that the citation to Palmore in City of Cleburne was significant. City of Cleburne, however, did not apply the strict scrutiny standard of review and stands only for the proposition that irrational biases cannot, in and of themselves, qualify as a legitimate governmental interest to satisfy rational basis review. The district court also mentioned Pruitt, a Ninth Circuit case involving discrimination against homosexuals in the military, because it also cited to Palmore. Pruitt, however, like City of Cleburne, did not apply the strict scrutiny standard of review. As such, neither case can be read as applying fundamental rights analysis.

The cases relied on by the district court as recognizing a fundamental right not to have the State endorse and give effect to private biases do not apply fundamental rights analysis, but rather involve traditionally suspect classifications or the

application of rational basis review. Accordingly, I conclude that the district court's issuance of the preliminary injunction in this case was based on the application of an erroneous legal premise that has never been recognized by the Supreme Court.

III

I am also compelled to address the "fundamental right to participate equally in the political process" because the majority, applying de novo review to the district court's legal conclusion, upholds the granting of the preliminary junction based on its recognition of, and reliance on, a different fundamental right than that identified by the district court.[10]

---

[10] I note that in reviewing a preliminary injunction that has been granted by a trial court, we are not required to analyze the alternative grounds raised by the parties before the trial court, but not ruled on, or to discuss grounds not raised below by the parties. Based on the limited grounds on which this case is before us, we need not analyze the assertion of the appellees that a preliminary injunction could have been properly issued based on a fundamental right to participate equally in the political process any more than we need address the original assertions of the appellees that Amendment 2 violated their (1) fundamental right to freedom of expression; (2) fundamental right to petition the government for redress of grievances; or (3) fundamental right to vote. Recognizing this fact, the appellees assert on appeal that the district court's ruling is best construed as holding that Amendment 2 infringes upon the fundamental right of political participation. See supra note 5.

Because the district court's ruling cannot be so construed, the majority justifies upholding the injunction on a different legal basis than that relied on by the district court by citing to Farmers Group, Inc. v. Williams, 805 P.2d 419, 428 (Colo. 1991). Neither the majority nor the appellees cite to any case where an appellate court has upheld a preliminary injunction based on different legal grounds than those articulated and relied on by the trial court. However, I agree that if a trial court erred in applying the applicable law, an appellate court, pursuant to its ability to review the underlying legal premises de novo, may apply the correct legal standard and uphold the

(continued...)

In my view, the majority's underlying legal premise that Supreme Court precedent has recognized such a fundamental right is also erroneous and provides no support for the conclusion that the strict scrutiny standard of review applies in this case.

The majority's extensive review of prior Supreme Court decisions indicates that language discussing citizen participation has appeared in a variety of contexts in numerous equal protection opinions. The traditional reading of these cases, however, suggests that the majority's analysis suffers from the same flaw as the district court's analysis--at no point has the Supreme Court explicitly identified the fundamental right that the majority extrapolates from the Supreme Court decisions on which it relies.

Appropriately categorized, there is no more of a common thread uniting the decisions cited by the majority than there is a common thread of logic or precedent to support the district court's analysis.[11] In my view, the cases cited by the majority all fall within Supreme Court decisions that address either the fundamental right to vote or ballot access, or

---

[10](...continued)
injunction if supported by the record. See Rowland Mach. Co. v. Dresser Indus., 749 F.2d 380, 385 (7th Cir. 1984) (stating that any purely legal determination made by a trial judge in granting or denying a preliminary injunction is subject to plenary appellate review).

[11]The majority's suggestion that a fundamental right to participate equally in the political process encompasses a wide variety of Supreme Court equal protection opinions in many ways is akin to the district court's delineation of the fundamental right it identified based on language drawn from other equal protection decisions.

opinions that involve suspect classifications. Based on a review of each of these three categories, I conclude that the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to participate equally in the political process is erroneous.

A

In a long series of cases beginning with Reynolds v. Simms, 377 U.S. 533 (1964), the Supreme Court has held that there is a fundamental right to have one's vote counted equally. See 2 Treatise on Constitutional Law § 15.7, at 435; e.g., Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).[12]

---

[12]The right to vote undoubtedly includes the right to participate in the electoral process by exercising the franchise. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis"); 2 Treatise on Constitutional Law § 15.7, at 435; cf. Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument, 41 Fla. L. Rev. 443, 459 n.63 (1989) (characterizing the "right to participate in elections on an equal basis" as a fundamental right).

Neither the appellees nor the majority, however, contends that the right to participate in the electoral process is equivalent to the much more expansive right to participate in the political process. See generally Laurence H. Tribe, American Constitutional Law § 13-1, at 1062 (2d ed. 1988) (characterizing political participation rights as "rights poised between procedural due process and the freedoms of expression and association"). Nor does the majority assert that in this case Amendment 2 infringed on the appellees' fundamental right to vote.

Notably, in their general discussion of fundamental rights in their brief before the district court, the appellees mentioned only the fundamental right to vote (including the right to participate in the electoral process) and not the more expansive

(continued...)

Traditionally, both commentators and case book authors have characterized these decisions as recognizing a fundamental "right to vote" that is subject to the strict scrutiny standard of review. See, e.g., John E. Nowak et al., Constitutional Law, ch. 16, § I at 765-76 (2d ed. 1983); 3 Treatise on Constitutional Law § 18.31, at 388-409; Russell W. Galloway, Jr., Basic Equal Protection Analysis, 29 Santa Clara L. Rev. 121, 150 (1989); James A. Kushner, Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review, 53 Mo. L. Rev. 423, 429-33 (1988); David M. Treinman, Equal Protection and Fundamental Rights--A Judicial Shell Game, 15 Tulsa L.J. 183, 195-202 (1980); see generally Gerald Gunther, Constitutional Law 787-823 (11th ed. 1985); William B. Lockhart et al., Constitutional Law: Cases-Comments-Questions 1316-56 (6th ed. 1986); Ronald D. Rotunda, Modern Constitutional Law 598-613 (3d ed. 1989).

---

[12](...continued)
fundamental right upon which they sought the injunction. The appellees stated:

> The two branches of equal protection law are distinct. Rights considered "fundamental" for equal protection purposes include the right to interstate travel (burdened by residency requirements); the right to electoral participation, including the right to vote (burdened by various qualifications and obstacles); the right of access to the courts (burdened by fees); and the right of privacy (burdened by laws affecting rights to procreation and family).

By doing so, the appellees appear to concede that the fundamental right to participate in the political process has yet to be identified by the Supreme Court.

The majority recognizes that the decisions it cites involving reapportionment or direct restrictions on the exercise of the franchise are readily distinguishable from the present case. The reason that these cases are distinguishable is because they all involve the well-settled fundamental right to vote. See, e.g., Kramer, 395 U.S. at 627 ("if a challenged state statute grants the right to vote to some bona fide residents . . . and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest"); Harper, 383 U.S. at 667 ("the political franchise of voting [is] a fundamental political right"); Reynolds, 377 U.S. at 562 ("the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized"); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("even the most basic [rights] are illusory if the right to vote is undermined").

As such, an extended analysis of these cases is not necessary to reach the conclusion that the Supreme Court decisions cited by the majority involving reapportionment or direct restrictions on the exercise of the franchise all fall within the jurisprudence addressing the fundamental right to vote and not within a broader-based fundamental right to participate equally in the political process. My conclusion is not only supported by the language quoted above, but also represents the

traditional view of constitutional commentators and case book authors. See Nowak et al., Constitutional Law, at 765-76; 3 Treatise on Constitutional Law § 18.31, at 388-409; e.g., Gunther, Constitutional Law, at 787-823; Lockhart et al., Constitutional Law, at 1316-56; Rotunda, Modern Constitutional Law, at 598-613; Galloway, Basic Equal Protection Analysis, 29 Santa Clara L. Rev. at 150-52; Kushner, Substantive Equal Protection, 53 Mo. L. Rev. at 429-33; Treinman, Equal Protection and Fundamental Rights--A Judicial Shell Game, 15 Tulsa L.J. at 195-202.

The fact that the appellees initially claimed before the district court that Amendment 2 would infringe upon the fundamental right to vote, in addition to asserting that Amendment 2 would infringe upon the fundamental right to participate equally in the political process, further buttresses this conclusion. See also supra note 12 (recognizing the implicit acknowledgement of the appellees that the fundamental right to participate equally in the political process has not been identified as a fundamental right).

B

In addition to recognizing that any infringement on the fundamental right to vote is subject to the strict scrutiny standard of review under the Equal Protection Clause, the Supreme Court has concluded in a separate line of decisions that regulations involving ballot access may implicate the Equal Protection Clause. The Constitution does not contain any express

provision that guarantees individuals the right to become a candidate, and the Supreme Court has never recognized a fundamental right of candidates to be listed on ballots. Nevertheless, the ballot access decisions indicate that heightened, although not strict, judicial scrutiny is required based on a combination of the fundamental right to vote and the First Amendment right of association. See 3 Treatise on Constitutional Law § 18.32, at 411; Galloway, Basic Equal Protection Analysis, 29 Santa Clara L. Rev. at 152; e.g., Burdick v. Takushi, 112 S. Ct. 2059 (1992); Anderson v. Celebrezze, 460 U.S. 780 (1983); Williams v. Rhodes, 393 U.S. 23, 30 (1968).

Admittedly, the Supreme Court has minimized the extent to which voting rights cases are distinguishable from ballot access cases, Burdick, 112 S. Ct. at 2065-66, and the early decisions within this category employed the strict scrutiny standard of review. See Williams, 393 U.S. at 30. Notably, however, the Supreme Court's more recent cases clearly indicate that the strict scrutiny standard of review does not apply to ballot access cases. See Burdick, 112 S. Ct. at 2060 (involving the open use of a balancing test); Anderson, 460 U.S. at 780 (same).

In Burdick, for example, the petitioner characterized the case as a right to vote case rather than as a ballot access case in an attempt to convince the Supreme Court that the strict scrutiny standard of review applied. Burdick, 112 S. Ct. at 2065. While recognizing the two different categories of case law, Burdick rejected the characterization of the case offered by

the petitioner and specifically found that the strict scrutiny standard of review did not apply. Id. at 2066. Instead, Burdick applied the balancing test that the Supreme Court adopted in Anderson.

The decisions cited by the majority falling within the ballot-access category of cases address entirely distinct questions and constitutional problems from the present case and do not apply the strict scrutiny standard of review. As such, any unifying principle linking these cases with decisions from other equal protection categories, is, in my view, attenuated.

C

After citing language from particular equal protection decisions in the ballot access and right to vote contexts, the majority addresses the limited category of cases on which it principally relies as establishing explicit support for the recognition of a fundamental right to participate equally in the political process. See maj. op. at 20-28. According to the majority, the equal protection doctrine delineated in Hunter v. Erickson, 393 U.S. 385 (1969), and subsequently addressed in James v. Valtierra, 402 U.S. 137 (1971), Gordon v. Lance, 403 U.S. 1 (1971), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), supports its conclusion that the Supreme Court has recognized a fundamental right to participate equally in the political process.

In my view, a careful reading of these four cases highlights the fact that they are not fundamental rights cases at all, but

instead address potential violations of the Equal Protection Clause based on traditionally suspect classifications, albeit in situations where the ordinary political process has been restructured. See Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 1991) (stating that "Hunter was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"); cf. Michael Klarman, An Interpretative History of Modern Equal Protection, 90 Mich. L. Rev. 213, 314 (1991) (stating that "[i]n the place of political process theory, the Justices have inserted a very different notion of equal protection--that racial classifications are presumptively unconstitutional because race almost invariably should be irrelevant to governmental decisionmaking"); Robert H. Beinfield, Note, The Hunter Doctrine: An Equal Protection Theory that Threatens Democracy, 38 Vand. L. Rev. 397, 405 (1985) (concluding that racial classifications provided the basis for the heightened level of judicial scrutiny in Hunter).

In Hunter, the Supreme Court addressed a city charter amendment repealing a racial anti-discrimination ordinance and requiring voter approval before such an ordinance could be enacted. Hunter, 393 U.S. at 387. The Supreme Court initially concluded that it "need not rest on Reitman to decide" the case before it because "unlike Reitman, there was an explicitly racial

classification [in Hunter]." Id. at 389.[13] Nevertheless, Hunter characterized the amendment as placing "special burdens on racial minorities within the governmental process," id. at 391 (emphasis added), and stated:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect," and subject to the "most rigid scrutiny." They "bear a far heavier burden of justification" than other classifications.

Id. at 391-92 (citations omitted) (emphasis added).[14]

Two years later, in James, 402 U.S. at 137, the Supreme Court was asked to apply Hunter in a case concerning the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low-income

---

[13]Hunter did not state that it could not rely on Reitman, which was decided the previous term, but rather suggested that it did not have to rely on Reitman to declare the statute unconstitutional. This conclusion is not surprising given that the cases involved completely different factual settings--one statute that embodied an explicitly racial classification (Hunter) and one that did not (Reitman).

Amici curiae in this case correctly point out that while Reitman plainly involved political participation issues, the Court analyzed it solely as a race case. It is somewhat difficult to explain why the Supreme Court would have relied exclusively on suspect classification grounds in Reitman when it could have struck down the statute based on the fundamental right that is today identified and embraced by the majority. In my view, the most logical explanation is that the Supreme Court simply did not recognize such a broad-based fundamental right. This explanation also accounts for the conspicuously superficial treatment that Reitman receives in the majority opinion.

[14]Subsequent federal cases addressing Hunter characterized the opinion as involving an unconstitutional racial classification. See, e.g., Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975); Lee v. Nyquist, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971).

housing projects until voters approved the project in a referendum. The federal district court relied on Hunter to find that the constitutional measure violated the Equal Protection Clause.

Under the broad reading of Hunter dictated by the majority, the federal district court's result should have been affirmed because the measure "involve[d] legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters (i.e. poor people who would qualify for low-rent housing)." Maj. op. at 18. In its attempt to place boundaries on the expansive fundamental right that it recognizes, limiting language requiring "the presence of an independently identifiable group of voters" appears throughout the majority's analysis. See maj. op. at 14, 26, 27, 29, 31, 32, 35.[15] For example, the majority concludes that just as Hunter fenced out an independently identifiable group, so too does Amendment 2 expressly fence out the

---

[15]The basis for the limiting language seized upon by the majority is the Supreme Court's statement in Gordon that in contrast to Hunter, it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing." Gordon, 403 U.S. at 5. While the statement was certainly true in Gordon, it was also irrelevant to the equal protection analysis, as is evidenced by the fact that such language did not appear in Hunter, James, or Washington.

It is interesting, however, that the district court in this case also attempted to restrict the boundaries of the fundamental right not to have the state endorse and give effect to private biases by employing the same language.

identifiable group of gay men, lesbians, and bisexuals. Maj. op. at 35.

Under the majority's analysis, the strict scrutiny standard of review therefore should have applied in James based on the fundamental right to participate equally in the political process, because James involved a group (poor people who would qualify for low-rent housing) that "was 'independently identifiable' apart from the group created by the statute itself." Maj. op. at 27. Just as "[t]he class singled out in Hunter was clear--'those who would benefit from laws barring racial, religious, or ancestral discriminations,'" Gordon, 403 U.S. at 5, the class singled out in James is equally clear--those who would benefit from local agency decisions providing for low-rent housing projects.[16]

Despite these considerations, the Supreme Court did not apply the strict scrutiny standard of review. James, 402 U.S. at 143. Instead, James found that the strict scrutiny standard of review applied in Hunter not because a fundamental right existed

---

[16]Similarly, just as Amendment 2 precludes gay men, lesbians, and bisexuals from "seeking governmental action favorable" to them, maj. op. at 36, and from enjoying the benefit of local provisions, so too did James preclude poor people who would benefit from low-rent housing from seeking governmental action favorable to them and from enjoying the benefit of previously adopted local agency decisions providing low-rent housing projects. Moreover, the constitutional measure adopted in James precluded poor people who would benefit from low-rent housing from employing the "normal political institutions and processes," maj. op. at 20, to seek low-rent housing projects by requiring the project to be approved by a majority of those voting at a community election. James, 392 U.S. at 138-39.

and was infringed upon, but because the city charter amendment at issue in Hunter affected a traditionally suspect class:

> Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." . . . Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . The present case could be affirmed only by extending Hunter, and this we decline to do.

Id. at 140-41 (emphasis added). In this sense, I agree with the majority that James is "best understood" as a case where strict scrutiny analysis did not apply because the identifiable group challenging the constitutional measure was not recognized as a suspect classification, maj. op. at 28 n.21, and find James to be dispositive of the case before us.[17]

---

[17]Justice Marshall, joined by Justices Brennan and Blackmun, dissented in James on the basis that a suspect classification was involved. Justice Marshall concluded that the constitutional provision at issue was "an explicit classification on the basis of poverty--a suspect classification which demands exacting judicial scrutiny, see McDonald v. Board of Election, 394 U.S. 802, 807 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, supra." James, 402 U.S. at 144-45. Justice Marshall's view has never been adopted by the Supreme Court.

In determining whether a group is a suspect or quasi-suspect class, the Supreme Court has identified several criteria to be used. San Antonio Indep. School Dist., 411 U.S. at 1; see also supra note 7 (discussing the origin of "discrete and insular minorities" language in footnote 4 of Carolene Products). Among others, the Supreme Court has indicated that the immutability of a group's identifying trait should be considered. Frontiero v. Richardson, 411 U.S. 677, 686 (1973); cf. Woodward, 871 F.2d at 1076 (noting that "homosexuality, as a definitive trait, differs fundamentally from those defining recognized suspect or quasi-suspect classes").

In explaining why the constitutional amendment at issue before it did not violate the Equal Protection Clause, however, James also cogently explained why Hunter, like Reitman before it, is "best understood" as a case where the strict scrutiny standard of review did apply because a traditionally suspect classification was involved. Before the Supreme Court, the appellees in James asserted that the mandatory referendum required by the constitutional amendment "hamper[ed] persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." James, 402 U.S. at 142. In this way, an identifiable group was fenced out from the normal political processes. Nevertheless, the Supreme Court specifically rejected the assertion of the appellees that such a restructuring of the political process violated the Equal Protection Clause:

> [O]f course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

Id. In my view, the rejection of the assertion of the appellees in James weakens, and all but forecloses, the broad reading of Hunter offered by the majority.

Less than two months after James, the Supreme Court in Gordon, 403 U.S. at 1, again distinguished Hunter by indicating that the reason the strict scrutiny standard of review was required in Hunter was because a traditionally suspect classification was involved. Gordon also involved a challenge by a group of interested citizens to a state's constitutional and statutory provisions, which in that case required a sixty-percent approval for any bonded indebtedness incurred by political subdivisions of the state. Id. at 2-3.

In rejecting the equal protection claim, Gordon stated:

> Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. . . . We are not, therefore, presented with a case like Hunter v. Erickson, 393 U.S. 385 (1969), in which fair housing legislation alone was subject to an automatic referendum requirement. The class singled out in Hunter was clear--"those who would benefit from laws barring racial, religious, or ancestral discriminations."

Id. at 5 (emphasis added). As in James, the strict scrutiny standard of review did not apply in Gordon because the group challenging the constitutional measure could not establish membership in a discrete and insular minority that the Supreme Court recognized as a suspect classification. In this sense, Gordon is also "best understood" as a case where strict scrutiny analysis did not apply because a suspect classification was not involved.[18]

---

[18]The fact that Gordon could not discern any "independently identifiable group or category that favors bonded indebtedness over other forms of financing," while certainly true did not (continued...)

In Washington, 458 U.S. at 457, the Supreme Court for the first time struck down a statewide initiative based on Hunter. Because the initiative was drafted to terminate the use of mandatory busing to achieve racial integration in the Washington public school system, the Supreme Court found that it violated the Equal Protection Clause:

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places special burdens on racial minorities within the governmental process," thereby "making it more difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest."

Id. at 470 (citations omitted).

That Washington's analysis was driven by the traditionally suspect classification involved in the case is further suggested by its reaffirmation of the principle of Hunter that meaningful and unjustified distinctions based on race are impermissible:

> When the political process or the decisionmaking mechanism used to address racially conscious legislation--and only such legislation--is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'" James v. Valtierra, 402 U.S., at 141, quoting Hunter v. Erickson, 393 U.S., at 391.

---

[18](...continued)
impact on the equal protection analysis. In James, where an identifiable group favoring low-income housing clearly existed, the Supreme Court nevertheless declined to apply strict scrutiny analysis because no traditionally suspect classification was involved. See supra note 17 and accompanying text.

Id. at 485-86.[19]

The foregoing review of Hunter and its progeny highlights my conclusion that the Supreme Court has never focused on the fundamental right of an independently identifiable group (i.e., poor people who would benefit from low-income housing) to participate equally in the political process. Rather, each of the four cases specifically focuses attention "on the special burdens on racial minorities within the governmental process." See Washington, 458 U.S. at 458; Gordon, 403 U.S. at 5; James, 402 U.S. at 141; Hunter, 393 U.S. at 391. Because all four decisions were driven by traditional strict scrutiny analysis

---

[19]My conclusion is further supported by Crawford v. Board of Educ., 458 U.S. 527 (1982), a Supreme Court opinion announced the same day as Washington that involved a similar attempt by state voters to restrain busing plans. In Crawford, however, the Supreme Court upheld a state constitutional amendment providing that state courts could not order mandatory student assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause. Id. at 529.

The petitioners asserted that the constitutional amendment fell within Hunter because it employed an "explicit racial classification" and imposed a "race-specific burden on minorities." Id. at 536. Crawford agreed that if the constitutional amendment employed a racial classification, the strict scrutiny standard of review would apply, but found Hunter inapplicable to the case before it because the amendment did "not embody a racial classification." Id. at 536-37. In this way, the constitutional amendment in Crawford differed from the amendment in Washington which embodied an explicit racial classification by reallocating decision-making authority in such a way as to make it more difficult for individuals to obtain legislation in their interest because of their race. See 3 Treatise on Constitutional Law § 18.9(3)(f), at 137; The Supreme Court 1981 Term, 96 Harv. L. Rev. 1, 120-30 (1982). The Supreme Court also stressed that having gone beyond the requirements of the Fourteenth Amendment, the state was free to return to the standards of the federal Constitution. Crawford, 458 U.S. at 542.

involving a suspect classification, the fact that the regulations at issue in each occurred within the context of the political process was not dispositive.

D

It is clear that language discussing citizen participation has appeared in a variety of contexts in Supreme Court equal protection opinions addressing the fundamental right to vote, ballot access, and suspect classifications. To date, however, the Supreme Court has never explicitly stated that a fundamental right to participate equally in the political process exists that is subject to the strict scrutiny standard of review. Nor has the Supreme Court found such a fundamental right within the penumbras of the Constitution. Therefore, I cannot agree with the majority's underlying legal premise that the Supreme Court has recognized such a fundamental right to support the strict scrutiny standard of review in this case.[20]

---

[20]The majority's underlying premise that Amendment 2 violates a fundamental right to participate equally in the political process is also difficult to reconcile with the constitutional and statutory provisions of twenty-one states denying individuals convicted of certain crimes, even if the individual is no longer incarcerated, from being elected to, or from holding public office. See Steven B. Snyder, Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office, 4 J.L. & Pol. 453 app. A (1988) (listing jurisdictions that specifically disqualify ex-felons from holding public office).

It is hard to imagine any greater form of participation in the political process than serving as an elected or appointed public official. Nonetheless, twenty-one states completely deny this aspect of political participation to the independently identifiable group of previously convicted felons. Notably, none of these provisions have been struck down based on an equal

(continued...)

involving a suspect classification, the fact that the regulations
at issue in each occurred within the context of the political
process was not dispositive.

It is clear that language discussing citizen participation
has appeared in a variety of contexts in Supreme Court equal
protection opinions addressing the fundamental rights to vote,
ballot access, and suspect classifications. To date, however,
the Supreme Court has never explicitly stated that a fundamental
right to participate equally in the political process exists that
is subject to the strict scrutiny standard of review. Nor has
the Supreme Court found such a fundamental right within the
penumbras of the Constitution. Therefore, I cannot agree with
the majority's underlying legal premise that the Supreme Court
has recognized such a fundamental right to support the strict
scrutiny standard of review in this case.[20]

---

[20]The majority's underlying premise that Amendment 2
violates a fundamental right to participate equally in the
political process is also difficult to reconcile with the
constitutional and statutory provision of twenty-one states
denying individuals convicted of certain crimes, even if the
individual is no longer incarcerated, from being elected to, or
from holding public office. See Steven E. Snyder, Let My People
Run: The Rights of Voters and Candidates Under State Laws Barring
Felons from Holding Elective Office, 4 J.L. & Pol. 455 app. A
(1988) (listing jurisdictions that specifically disqualify
ex-felons from holding public office).

It is hard to imagine any greater form of participation in
the political process than serving as an elected or appointed
public official. Nonetheless, twenty-one states completely deny
this aspect of political participation to the independently
identifiable group of previously convicted felons. Notably, none
of these provisions have been struck down based on an equal

(continued...)

In my view, rather than expressing a willingness to extrapolate new fundamental rights based on selective language from prior Supreme Court decisions, we should exercise caution in identifying and embracing previously unrecognized fundamental rights. See Bowers, 478 U.S. at 194-95 (stating that "there should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental"); Dronenburg, 741 F.2d at 1396 (stating that "[i]f it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so").

At some point in the future, the Supreme Court may agree with the majority's underlying legal premise and identify such an expansive fundamental right to participate equally in the political process. Such a substantive due process decision would most likely conduct an analysis similar to previous Supreme Court decisions and address the importance of the right, relevant Constitutional provisions, the history and traditions of our country, and whether the right is implicit in the concept of ordered liberty. The fact that such analysis is not present in the Supreme Court precedent cited by the majority cautions against the recognition of such a fundamental right.

I am also troubled by the broad reading given to the Supreme Court cases relied upon by the majority because it is contrary to

---

[20](...continued)
protection challenge for infringing on a fundamental right to participate equally in the political process.

In my view, rather than expressing a willingness to extrapolate new fundamental rights based on selective language from prior Supreme Court decisions, we should exercise caution in identifying and embracing previously unrecognized fundamental rights. See Bowers, 478 U.S. at 194-95 (stating that "these should be, therefore, great reluctance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental"); Dronenburg, 741 F.2d at 1396 (stating that "[i]f it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so").

At some point in the future, the Supreme Court may agree with the majority's underlying legal premise and identify such an expansive fundamental right to participate equally in the political process. Such a substantive due process decision would most likely conduct an analysis similar to previous Supreme Court decisions and address the importance of the right, relevant Constitutional provisions, the history and traditions of our country, and whether the right is implicit in the concept of ordered liberty. The fact that such analysis is not present in the Supreme Court precedent cited by the majority cautions against the recognition of such a fundamental right.

I am also troubled by the broad reading given to the Supreme Court cases relied upon by the majority because it is contrary to

---

20/ (continued)

protection challenge for infringing on a fundamental right to participate equally in the political process.

the underlying principles of Oregon v. Hass, 420 U.S. 714, 719 (1975). Under Hass, a state court cannot impose a restriction as a matter of federal constitutional law that the Supreme Court has specifically refrained from adopting. Id. In James, the Supreme Court confronted an equal protection challenge by an identifiable group of persons who had been fenced out by the majority's alteration of their access to the political process. Because James explicitly refrained from extending Hunter to declare a fundamental right to participate equally in the political process when it rejected the appellees' assertion in that case, we are constrained by the principles of Hass from doing so now. See People v. Cisneros, No. 91SC467, 1993 WL 242337, at *9 (Colo. July 6, 1993) (Erickson, J., concurring) (citing Hass, 420 U.S. at 719); see also DiLeo v. Board of Regents, 590 P.2d 486, 491 (Colo. 1978) (Erickson, J., dissenting) (only the United States Supreme Court can pronounce the final word on whether the strict scrutiny standard of review or the rational basis standard of review applies). Rather, a straightforward application of James indicates that the strict scrutiny standard of review does not apply in this case.

IV

In my view, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases is erroneous. Similarly, the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to

IV

In my view, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases is erroneous. Similarly, the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to

participate equally in the political process is erroneous. Because Supreme Court precedent does not support the evaluation of Amendment 2 under the strict scrutiny standard of review, I would reverse and discharge the entry of the preliminary injunction, and remand for trial on the permanent injunction.